Normala Samsudin v Keluarga Communication Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–23–12 OF 1996
KAMALANATHAN RATNAM J
13 APRIL 1999

Tort — Defamation — Libel — Publication of article alleging payment of money to husband to release wife from marriage bond by way of 'tebus talak' — Whether defamatory — Whether plaintiff authorized such publication — Whether aggravated and exemplary damages proved

The plaintiff is a well known television personality and a prime time newscaster with TV3. The defendant, the publisher of *Mingguan Wanita* ('the magazine'), had on its 26 January - 2 February 1996 issue, published on its cover a photograph of the plaintiff, and an article which, inter alia, mentions a third person in her married life and the payment of RM3m to her husband to release her — by way of 'tebus talak' — from her marriage bond ('the article'). The plaintiff alleged that the article was defamatory of her and was understood to bear the meanings and inferences that the plaintiff bought herself off from her marriage bondage by paying her ex-husband the sum of RM3m. The defendant, while admiting to publishing the magazine with the main photograph of the plaintiff: (i) denied that the article in its ordinary meaning bears any meaning defamatory of the plaintiff; (ii) averred that the plaintiff authorized the publication of the article; and (iii) alleged that as full satisfaction of the plaintiff's cause of action, the defendant had caused to be published in a conspicuous position in the subsequent magazines an explanation and also an apology by the defendant for publishing the article.

Held, awarding a sum of RM100,000 as general damages for the libel, and a further sum of RM100,000 as aggravated damages with interest on both sums:

(1) The article in its natural and ordinary meaning and/or by way of innuendoes conveyed the meaning that the plaintiff was a person whose marriage bond had a price tag to it and that for a payment of RM3m she was bought off her marriage vows. It connotes a loose charactered woman with lax morals. Thus, the words complained of by the plaintiff were indeed calculated to expose her to hatred, ridicule or contempt in the mind of a reasonable man or that such words tend to lower her in the esteem of right thinking members of the public generally (see p 662E–G).

(2) Whilst 'tebus talak' by itself is an innocent expression of a mode of divorce available to a wife, the reference to a third party making payment of the compensation to the husband is downright vilification of the plaintiff's good name (see p 663I).

(3) On the defence contention that the plaintiff authorized or acquiesced in the publication of the article, the court found that this was not borne out by the evidence nor pursued by the defence. The court was therefore satisfied that the plaintiff had indeed made out a case for libel (see p 665H–I).

(4) A case of aggravated damages had also been proved. The defendant aggravated the defamation by further repeating the libel in publications subsequent to the impugned publication, despite a complaint by the plaintiff. The defendant's half hearted attempt at an apology was another factor to consider in awarding aggravated damages (see p 666D–F).

(5) Since it is required that a claim of exemplary damages which are punitive in nature be specifically pleaded and since in this case the plaintiff had not pleaded specifically for exemplary damages, the court would decline to consider the same even though the plaintiff has included this claim in her submission (see pp 666I–667A).

[Bahasa Malaysia summary

Plaintif adalah seorang personaliti televisyen dan juga pembaca berita utama di TV3. Defendan, penerbit *Mingguan Wanita* ('majalah tersebut'), telah pada isu 26 Januari - 2 Februari 1996, menerbitkan pada muka depan majalah tersebut gambar plaintif dan suatu rencana yang antara lain, menyatakan seorang pihak ketiga dalam kehidupan perkahwinannya dan pembayaran RM3 juta kepada suaminya untuk melepaskannya — secara tebus talak — daripada ikatan perkahwinannya ('rencana tersebut'). Plaintif tersebut mengatakan bahawa rencana tersebut memfitnahkannya dan difaham sebagai membawa maksud-maksud dan inferens bahawa plaintif telah membeli diri daripada ikatan perkahwinannya dengan membayar bekas suaminya sejumlah RM3 juta. Defendan sementara mengaku menerbitkan majalah tersebut dengan gambar utama plaintif: (i) menafikan bahawa rencana tersebut dalam maksud biasa membawa apa-apa maksud yang memfitnah plaintif; (ii) menegaskan bahawa plaintif telah memberikan autoriti untuk menerbitkan rencana tersebut; dan (iii) mengatakan bahawa sebagai memuaskan sepenuhnya kausa tindakan plaintif, defendan telah menerbitkan dalam dengan jelas di dalam penerbitan yang seterusnya suatu penjelasan dan juga kemaafan oleh defendan kerana menerbitkan rencana tersebut.

Diputuskan, mengaward jumlah sebanyak RM100,000 sebagai ganti rugi am untuk libel, dan juga jumlah selanjutnya sebanyak RM100,000 sebagai ganti rugi teruk (aggravated damages) dengan faedah untuk jumlah kedua-dua ganti rugi:

(1) Rencana tersebut dalam maksud semulajadi dan biasa dan/atau secara sindiran telah membawa maksud bahawa plaintif adalah

seorang di mana ikatan perkahwinannya mempunyai tanda harga di atasnya dan dengan pembayaran RM3 juta, beliau dilepaskan daripada ikatan perkahwinannya. Ia membawa konotasi seorang wanita yang berperangai murahan dengan keruntuhan moral. Oleh itu, perkataan yang diadu oleh plaintif sememangnya dikira akan mendedahkannya kepada kebencian, cemuhan dan penghinaan di dalam pemikiran seorang yang munasabah atau perkataan-perkataan sebegini berkecenderungan secara am untuk merendahkannya di pandangan pemikiran orang awam yang biasa (lihat ms 662E–G).

(2) Walaupun tebus talak dengan sendirinya merupakan ungkapan tidak negatif mengenai cara perceraian yang terbuka kepada seorang isteri, rujukan kepada pihak ketiga membuat pembayaran sebagai ganti rugi kepada suami adalah dengan jelas suatu pencercaan nama baik plaintif (lihat ms 663I).

(3) Atas penegasan pembelaan bahawa plaintif telah memberi kebenaran atau bersetuju kepada penerbitan rencana tersebut, mahkamah mendapati bahawa ini tidak dibuat melalui keterangan atau ditegaskan oleh pembelaan. Oleh itu, mahkamah berpuas hati bahawa plaintif telah membuktikan satu kes libel (lihat ms 665H–I).

(4) Suatu kes ganti rugi teruk juga telah dibuktikan. Pihak pembelaan telah memburukkan fitnah tersebut dengan selanjutnya mengulang libel tersebut di dalam penerbitan-penerbitan yang kemudian kepada penerbitan yang dipersoalkan tersebut, walaupun telah diadu oleh plaintif. Cubaan defendan yang tidak ikhlas dalam membuat kemaafan adalah suatu faktor lain yang dipertimbangkan dalam mengaward ganti rugi teruk (lihat ms 666D–F).

(5) Oleh kerana keperluan untuk tuntutan ganti rugi teladan yang berbentuk hukuman perlu diplidkan secara spesifik dan oleh kerana plaintif tidak memplid secara spesifik untuk gantirugi teladan, mahkamah tidak akan mempertimbangkannya walaupun plaintif telah memasukkan tuntutan ini di dalam hujahannya (lihat ms 666I–667A).]

Cases referred to

Chapman v Lord Ellesmere & Ors [1932] 2 KB 431 (refd)

Lewis & Anor v Daily Telegraph Ltd; *Same v Associated Newspapers Ltd* [1963] 2 All ER 151 (refd)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493 (refd)

Ratcliffe v Evans [1892] 2 QB 524 (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Malayu Bhd & Anor [1973] 2 MLJ 56 (refd)

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 165–230.

Yusuf Khan bin Ghows Khan (*Cantius Leo* with him) (*Yusuf Khan & Pathamanathan*) for the plaintiff.

Haris Ibrahim (*Zuwita Kamaruzaman* with him) (*Adam & Co*) for the defendant.

Kamalanathan Ratnam J:

The plaintiff's claim

The plaintiff's action arises from, and is based on, the defendant's publication in *Mingguan Wanita* ('the magazine') of 26 January - 2 February 1996 issue wherein the cover portrays a photograph of the plaintiff with the words 'Mala Tebus Talak RM3 Juta?' and within the magazine, photographs of the plaintiff and an article under the heading 'Jiwa lara seorang Normala, Hatinya berkata iya, bibirnya berkata tidak!' which the plaintiff alleges is defamatory of her and is understood to bear the meanings and inferences that:

(i) the plaintiff bought herself off from her marriage bondage by paying (her ex-husband) the sum of RM3m;

(ii) there is a third person in the plaintiff's marriage;

(iii) the plaintiff attempted to deny the aforesaid by attributing the same as an ordinary occurrence;

(iv) the plaintiff is not forthright;

(v) the third person in the plaintiff's life had paid the RM3m to the plaintiff's husband;

(vi) the plaintiff is an immoral person;

(vii) the plaintiff's divorce is the result of her extra-marital affairs;

(viii) the plaintiff is selfish, and/or self-centred, and/or mercenary; and

(ix) the plaintiff does not care for the welfare and happiness of her children.

A translation of the said article reads as follows:

> IS IT TRUE that popular TV3 hostess Normala Samsudin is divorced from her husband, Ruslan?
>
> Finally, the news is confirmed. True. Mala is divorced from her husband.
>
> This question plays on the mind of whoever is interested in this glamorous woman. I pondered to myself how married life is actually a gamble.
>
> It was not my intention to dig up again what has been fated for the couple but as an admirer of this hostess, I was caught up in the mood of the moment. Why did I feel that way?
>
> It appears that this is one of the advantages of being a journalist. Many unexpected stories crop up. As if the phone calls were not enough, stories from my friends lent further confirmation.

One such story is that there is a third person in her marriage. This made me quickly contact her. As I have expected, Normala strenuously denied it and said such happenings were something normal.

'I do not deny having received several phone calls from particular people. I consider it all part of the ups and downs that have to be experienced by someone whose work involves the public.'

'Enticed? No. I am certain that I am strong enough to face it all. In such a situation, I stay firm to my own attitude. If disappointments befall me, I will be more determined; I feel the disappointments will go away', said Normala sweetly.

From her explanation, I felt that she was clearly and with determination trying to avoid discussing matters involving her marriage. So much so that when I asked her to chronicle her romance with her husband Ruslan Hussain, a Pilot First Officer with MAS, for the (magazine's) MEMORI CINTA column, Normala gently declined. Her explanation was that she did not want to injure the feelings of anyone.

So it was too when I asked what her husband thought of the situation, she answered: 'He understands and knows the situation that I am forced to face. It's not that he doesn't care but he advises me a lot to be more cautious'.

'My husband advises me not to project myself too much in the public eye except when working. I always reassure him (that I will not). My husband understands and always gives me encouragement.'

That's Normala's stand. Her married life is her priority, although she continues in the broadcasting field. 'Married life requires compromise. Husbands must not always think of themselves. Their wives' wishes must be understood and heeded'.

'Wives, like other people, also have aspirations and interests. There are husbands who prevent their wives from appearing on television whereas that field is what interests the wives ...' added Normala in expressing her view.

I asked myself whether there was another story behind her view. Did Normala want to express her true feelings. Then I received a phone call from someone who admitted being an admirer of Normala, who told me her marriage was in dire straits.

More interestingly, apparently there was a third person in her life who was prepared to pay RM3m to her husband as 'tebus talak' (compensation) to divorce her. I was stunned for a while and then I heard from a friend that apparently her husband had taken a new wife.

Normala was disappointed because while she avoided temptations, her fidelity has been wasted. Her explanation was too simple. Her husband wanted a full-time housewife!

Such is this life. I met Normala again during the NONA Hostess Invitation show last December and in the hustle and bustle of the function I still managed to ask whether there was any truth in the stories.

Normala's gentle attitude and the sweet smile on her lips made me think: How strong this woman was. Her behaviour was as if nothing had happened. She was still calm and radiant. But who knew her inner feelings ...

'We cannot prevent people from saying things about us, especially a celebrity like me. It's up to them what they want to say. I can only say that I

A am happy with my life now!' Normala answered while inviting me to enjoy the food that had been laid out.

Whatever stories are told about Normala Samsudin after this, I shall not pay them too much attention. Only I suddenly became sad when I remembered that this approaching Syawal, Asraf, Ruhila and Rubi surely would lose something. Will the joy of last year's Aidilfitri be repeated? WM

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The defence

The defendant avers having no knowledge that the plaintiff is a well known television personality and a prime time newscaster with TV3, but admits C publishing the said magazine with the main photograph of the plaintiff and avers that the words on the cover thereof are phrased as a question and not a statement. The defendant also admits writing and publishing the article and the photographs but denies doing so with false and malicious intent or that the article was understood to bear a false and malicious intent and further avers that the said article is a continuation of a previous article D published in Issue No 623 dated 27 October - 3 November 1995 ('the first magazine') which was based on a telephone interview between the plaintiff and one Anwar bin Razali ('the reporter').

The defendant also denies that the said article in the second magazine (the subject of this action) in its ordinary meaning bears or was understood E to bear or was capable of bearing any meaning defamatory of the plaintiff.

Further, the defendant avers that the plaintiff authorized and/or assented to and/or acquiesced in the publication of the said article.

The defendant also alleges that by an oral agreement made on or about 9 February 1996 between the plaintiff and the reporter as the defendant's F agent, it was agreed between the parties that as full satisfaction and discharge of her cause of action in respect of the said words and in consideration of the same the defendant would cause to be written, printed and published in a conspicuous position in their magazine, a subsequent explanation of the plaintiff and of the interview mentioned in the said article and an apology to the plaintiff and her family, in the event the said G publication by the defendant which mentioned the matter of 'Tebus Talak RM3 Juta' had caused confusion and misunderstanding and a retraction of the same.

The defendant maintained that pursuant to the said agreement, it had caused to be printed and published in a conspicuous position in the H subsequent magazines an explanation and a denial by the plaintiff of the allegations contained in the article in the second magazine, and also an apology by the defendant for mentioning the matter of 'Tebus Talak RM3 Juta'.

In the alternative, the defendant denied that the article infers the I meaning or is understood to bear the meaning or is capable of bearing the meaning as stated by the plaintiff.

Facts

From the evidence adduced in this case, the following facts are apparent.

The plaintiff has been with TV3 since 1991 and had been its presenter cum newscaster and has been hosting several TV programmes and is also a broadcast journalist. Some time in September 1995, the defendant's reporter for Mingguan Wanita interviewed the plaintiff via the telephone. At the said interview, the plaintiff declined to talk about her private life and never made any comment about any second or third person in her married life, let alone say anything about 'Tebus Talak RM3 Juta'. Based on this interview, the defendant published an article in the first magazine which is not the subject of this action. Some time in December 1995 when the plaintiff hosted the TV3 programme known as 'Nona', several reporters including the said reporter interviewed her but nothing was mentioned about a third person in her life and 'Tebus Talak RM3 Juta'. However, the defendant published the second magazine which carried the plaintiff's photographs and on the cover the words 'Mala Tebus Talak RM3 Juta?' and within the magazine under the heading 'Heartache of the person Normala, Her heart says Yes, Her lips says no!' which inter alia mentions a third person in her married life and the payment of RM3m to her husband to release her from her marriage bond. Upon reading the article in the second magazine, the plaintiff contacted the reporter and asked him to put right the incorrect matters published about her and to apologize for the same. The defendant published the third magazine which purports to comply with the plaintiff's request. The plaintiff was not satisfied that the article in the third magazine had put matters right. Her dissatisfaction was conveyed through one Anis, who was not called as a witness. The defendant then published the fourth magazine which purports to explain the truth and to apologize.

Findings of the court

Though in its defence, the defendant contends it has no knowledge that the plaintiff was, and still is, a well known television personality and a prime time newscaster with TV3, I find that the plaintiff's testimony on this point has not been seriously challenged, let alone rebutted. In fact, even the impugned article refers to the plaintiff as a 'popular TV hostess'.

The defendant has admitted to the publication but contends that it was based on the telephone interview of the plaintiff which the said reporter conducted in September 1995 and the interview in December 1995. In fact, the said reporter admitted that the article in the third magazine was based on the September 1995 interview. However, he also admits to meeting the plaintiff in December 1995 when she hosted the TV programme 'NONA' and the impugned article appearing in the second publication is as a result of those two interviews.

The said reporter maintained that he had recorded the second interview held in December 1995. However, neither the said recording nor any notes in respect of this interview has been produced. Surely it ought to have been

an act of prudence on the part of the said reporter of the defendant to have preserved the contemporaneous notes since there was already a request for an apology. The defendant ought to have clearly anticipated the need to preserve the said recording in the event of litigation being commenced. In the absence of any such notes being produced, I must draw an adverse inference against the defendant. Surprisingly though, the defendant was able to produce recorded notes of the first interview held in September 1995 but there was clearly nothing adverse of the plaintiff, recorded in that interview.

From her testimony, I accept the plaintiff's evidence. In spite of thorough and penetrating cross-examination by En Harris for the defendant, who conducted himself with utmost restraint, the plaintiff in my view emerged unscathed. I have no hesitation in finding that she was not willing to say anything about her private life. I also find that when asked general questions, she made generalised comments. It is clear that she never commented about any third person in relation to her marriage. I also find that the said reporter never questioned her of any 'tebus talak' at RM3m during either the September 1995 or the December 1995 interview.

When the defendant was requested to publish an apology, it published what it contended was an apology in the third magazine. However, having read the said publication, I find that the article contained therein was the plaintiff's own denial of the allegations contained in the impugned article and a running commentary by the defendant of the plaintiff's denial.

The plaintiff was dissatisfied with what was published in the third magazine and conveyed this dissatisfaction to the defendant through one Anis. The defendant then published in the fourth magazine what it contended was an apology expressing regret to the plaintiff and her family for any misunderstanding and confusion if any arising from the matter of 'tebus talak RM3 juta'.

Having read the publication in the fourth magazine, I find that it is nothing more than a repetition of the alleged libel. After a rhetoric repetition of the impugned article in the fourth magazine the defendant concluded with an apology which translated speaks as follows:

> Mingguan Wanita which mentioned 'tebus talak RM3 juta' in an article entitled 'Feelings of sorrow of one Normala' published in No 636, dated 26 January 1996 hereby retract the said publication. We regretted the said publication and apologize to Normala Samsudin and family if the said publication had caused confusion and misunderstanding to those involved — Editor

To my mind, the said apology if it can be considered as that is, nothing but a conditional apology. Truly, the defendant is not contrite. Firstly, for the defendant to tender an apology it must be understood that the defendant has accepted the fact that its publication has indeed defamed the plaintiff.

The article seems to suggest that the reporter being 'caught up in the mood of the moment' and having 'the advantages of being a journalist' is given a lascivious licence to malign the plaintiff with malicious innuendoes.

I find that the suggestion of a third person in the life of the plaintiff who was prepared to pay RM3m to the plaintiff's husband as 'tebus talak' (compensation) so that the plaintiff's husband could divorce her was nothing more than an act of sensationalism motivated with the particular desire of boosting the sales of the defendant's magazine for pecuniary gain at the expense of the plaintiff's name and reputation. Publishers such as the defendant must realize that if they go beyond the line of propriety and enter into the realm of journalistic escapism, with a myopic view of achieving a filled coffer at the expense of people of prominence, then if the injured party fights back, the publisher must be able to justify his stand.

In the case before me, not only was the defendant callous of conduct, the defendant was indifferent to promulgating injurious falsehood. Even the apology was never from the gut. It was a conditional apology in that it took effect only if it caused confusion and misunderstanding to those involved.

In *Lewis & Anor v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151 at p 154, Lord Reid said as follows:

> ... There is no doubt that in actions for libel, the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute to the words a meaning not apparent to those who do not have that knowledge.

I am satisfied that the impugned article in its natural and ordinary meaning and/or by way of innuendoes conveyed the meaning that the plaintiff was a person whose marriage bond had a price tag to it and that for a payment of RM3m she was bought off her marriage vows. It connotes a loose charactered woman with lax morals. Clearly, the libel was launched based on rumours that there is a third person in the life of the plaintiff and that someone had paid her husband RM3m to buy her out of her marriage. To my mind, the words complained of by the plaintiff were indeed calculated to expose her to hatred, ridicule or contempt in the mind of a reasonable man or that such words tend to lower her in the esteem of right thinking members of the public generally.

I reject the defence contention that the words complained of in totality are incapable of bearing a defamatory meaning. Whilst I agree that the words 'tebus talak', 'orang tiga' taken in their normal meaning and context are not at all defamatory of the plaintiff, but when juxta-positioned with the name of the plaintiff and with blazing headlines, the words 'Mala tebus talak RM3 juta' clearly do not convey innocent and harmless connotations. In fact, in *Syed Husin Ali v Sharikat Penchetakan Utusan Malayu Bhd & Anor* [1973] 2 MLJ 56 Mohamed Azmi J (as he then was) said at p 58:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the

> plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

It is clear that his Lordship in that case did not limit the categories of cases reflecting upon the moral character of a person thus giving rise to a case of defamation. Surely, imputations of unchastity and adultery are obvious cases reflecting upon the moral turpitude of a woman.

Under syariah law, the 'tebus talak' or 'khul' is a provision afforded to a Muslim wife to facilitate a divorce in the event the husband refuses to release her. I refer to *Islamic Law in Malaysia* by Professor Ahmad Ibrahim. The author explains at p 210 that 'tebus talak' is:

> ... accomplished by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital rights.

The defendant argues that since the syariah law has specifically provided the means and method by which divorce by 'tebus talak' can be effected therefore the words 'tebus talak' by themselves per se cannot be defamatory. Whilst I accept that as true, the fact remains that there was no such truth in so far as the plaintiff was concerned. There was no 'tebus talak' divorce nor was there any evidence of payment of compensation to the plaintiff's husband by the plaintiff. But in this case, there is a very serious allegation that in fact in the view of Professor Ahmad Ibrahim takes the case out of 'tebus talak' as provided in the Hukum Syarak. The plaintiff contends that the defendant has alleged that a third party was prepared to pay RM3m to the plaintiff's husband as 'tebus talak'. Therefore, the issue arises whether such a payment by a third party of the compensation to the husband can constitute compensation within the meaning of Hukum Syarak because for the 'tebus talak' to be effective, the compensation must emanate out of the estate or property of the wife. The basis of 'khul' or 'tebus talak' is a tradition of the Prophet as reported in *Manual of Hadith* by Muhammad Ali at p 284 which reads as follows:

> Ibn 'Abbas reported that Jamilah bte 'Abd Allah wife of Thabit bin Qais came to the Holy Prophet and said: 'O Messenger of Allah as for bin Qais, I do not blame him about his character and piety but I dislike ingratitude in Islam'. The messenger of Allah asked if she was prepared to return the garden given to her by Thabit. 'Yes' said she. The Prophet said to Thabit bin Qais: 'Accept the garden and give her a single divorce.'

The *Kamus Lengkap* defines 'tebus talak' as when a woman obtains a divorce by returning the dowry or mas kahwin that the husband or his representative had paid to the wife.

It is my judgment therefore that whilst 'tebus talak' by itself is an innocent expression of a mode of divorce available to a wife, the reference to a third party making payment of the said compensation to the husband is downright vilification of the plaintiff's good name.

Leave and Licence

Carter-Ruck on *Libel and Slander* (4th Ed) states that:

> It is a defence to an action for libel or slander for the defendant to plead and prove that the plaintiff has authorized or assented to the publication of the words complained of. The defence is based on the maxim volenti non fit injuria by which no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it.

Since the defendant has pleaded that the plaintiff authorized and/or assented to and/or acquiesced in the publication of the words complained of, I have to now consider whether the defendant had proved that the plaintiff had either by express or implied conduct authorized or assented to the said publication.

The principle of law of the defence of leave and licence is illustrated in the celebrated case of *Chapman v Lord Ellesmere & Ors* [1932] 2 KB 431 where it was held by Slesser LJ at p 462 that:

> The defendants, in addition to saying that the words are true in their natural meaning and are not capable of being defamatory in that meaning, have pleaded the defence of privilege; and, further, as regards one publication of the defendants other than the Times, that in the Racing Calendar, they say that the plaintiff, by his assenting as a condition to the granting of a licence that he would be bound by the Rules of Racing, has agreed to the publication of the results of the stewards' decisions in the Racing Calendar and cannot be heard to complain of a tort to which he himself has assented.
>
> I propose to deal with this case of the publication in the Racing Calendar first, as it presents certain peculiar features which do not apply in the case of the other publications with regard to the assent of the plaintiff to the publication. This defence is based upon the doctrine of volenti non fit injuria. In the words of *Salmond on Torts* (7th Ed) p 58: 'No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it; *Volenti non fit injuria*. No man can enforce a right which he has voluntarily waived or abandoned': See *Smith v Baker & Sons* [1891] AC 325, a case of negligence to which the principle has been expressly applied, but it is of general application. ... On this matter, the conclusion at which I have already arrived, that the finding of the jury is directed to an innuendo and is not a finding as to the actual meaning of the words, becomes so material, for if the plaintiff assented to a report of the decision of the stewards, and they used words which were not a report of that decision, Sir Patrick Hastings' argument would have great weight; but if, on the other hand, in fact, they did report the actual decision, but in such a way that the jury say that it was to be understood to mean something other than the actual decision, that is a risk which the plaintiff, by agreeing to a report of the decision, has elected to run.

On this issue, the case for each party rests on its credibility. Whom does the judge believe. The defence is that during the interview held in September 1995 and in December 1995, the reporter had touched on the issues that had been published. Whilst the defendant was able to produce the sketchy notes of the report in respect of the interview in September 1995 which did not at all contain any reference to the impugned publication, yet the

defendant was unable to produce any notes, recordings or references made by the reporter in respect of the interview conducted in December 1995. Whilst there is clear evidence of the plaintiff seeking retraction of the publication, at least on this score, the defendant ought to have sought the preservation of any original notes, recordings or references of the interview held in December 1995. This court cannot be faulted if it took the inference that there was indeed no such notes, recordings or references made contemporaneous with the said interview. In any case, whether there has been assent or not, is a question of fact. In the light of the evidence before me, I find no assent by the plaintiff to the publication of the impugned words complained of. In fact, I accept the plaintiff's testimony that she made no comment of a second or third person in her marriage. The plaintiff specifically said, 'He asked a general question like this: "How is it if a third person enters the marriage?" So I gave a general comment. He never asked me directly in respect of my personal life and marriage'.

On the defence contention that the impugned words are in fact in the form of a question rather than a statement, I need only to refer to Gatley on *Libel and Slander* (9th Ed) (1998) para 3.15:

> ... It is immaterial whether the defamatory imputation is conveyed by words of direct assertion or by suggestion, for insinuation may be as defamatory as an explicit statement and even more mischievous. Similarly, words may be defamatory even though they are used in an interrogative form, and in principle the same should apply if they are used in a hypothetical way, so long as in the context in which they are used they may reasonably be interpreted to convey the truth. The tendency and effect of the language, not its form, is the criterion and a defendant cannot defame and escape the consequences of dexterity of style. 'The results of a calumnious falsehood arise from the impression which it — all of it, including reservations, cautions, and all the rest — makes upon the minds of the readers, an impression which may be quite apart from any artificial restriction which the author of the falsehood sought to impose'.

The defendant's contention that the impugned publication is a continuation of the first publication consequent to the interview of the plaintiff by the reporter in September 1995 cannot be true. I accept the plaintiff's evidence that she did not tell the defendant's reporter anything about her private life let alone about any third man in her marriage or that the said third man had paid RM3m to buy her out of her marriage bond either in the September 1995 or in the December 1995 interview.

It is my judgment that the words on the cover 'Mala Tebus Talak RM3 Juta?' in their natural and ordinary meaning are meant or understood to mean that the plaintiff bought herself off from her marriage bondage by paying her husband the sum of RM3m.

On the defence contention that the plaintiff authorized or acquiesced in the publication of the impugned article, I find that this is not borne out by the evidence nor pursued by the defence. I am therefore satisfied that the plaintiff has indeed made out a case for libel.

Damages

A

It is trite that in cases of libel and slander actionable per se, the plaintiff need not prove actual damages for as was said by Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524 at p 528: 'The law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation'.

B

It is also trite that in assessing damages, the court can take into account the distress, hurt and humiliation the impugned publication has caused to the plaintiff. Unfortunately, no evidence was led by those who know the plaintiff well as to her moods and demeanour after she became aware of the defamatory statements.

C

The plaintiff is a TV personality and has even hosted programmes. She is also a broadcast journalist. Whilst it is a fact that the plaintiff was already divorced at the time of publication, yet the defendant published that there was a third person in her marriage, imputing adultery, unchastity or immoral behaviour on the part of the plaintiff.

D

Aggravated Damages

I also find that a case for aggravated damages has been proven. The defendant aggravated the defamation by further repeating the libel in publications subsequent to the impugned publication, despite a complaint by the plaintiff and a demand for a correction and apology. Clearly, the defendant sought a repetition of the defamation by publishing it in the third and fourth publications. This to my mind was solely motivated by a desire to boost the sales of the magazine and to live off the loss of the plaintiff's reputation. This kind of conduct cannot go unpunished.

E

The defendant's half hearted attempt at an apology was another factor to consider in awarding aggravated damages.

F

It is obvious that the defendant was oblivious to the fact that the impugned publication was untrue. The plaintiff testified that her divorce took place in June 1995 and was finalised in November 1995. This was confirmed by PW2, her husband, who testified on her behalf. Since the plaintiff was already divorced, the question of her being bought out of the marriage did not at all arise at the time of the publication. Finally, it is appropriate that I refer to the words of Abu Mansor JCA in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 at p 531. His Lordship said as follows:

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> I think the court has to take a stand and deliver the message to all journalists and the media alike that they must act responsibly. They ought to know that they have a large following, and that the reading public hold in high esteem and has the tendency to accept what is written as gospel truth. ... they should, therefore, have acted with responsibility.

H

Since it is required that a claim of exemplary damages which are punitive in nature be specifically pleaded (see *Halsbury's Law of England* (4th Ed) para 183) and since in this case the plaintiff had not pleaded specifically for

I

A exemplary damages, I decline to consider the same even though the plaintiff has included this claim in her submission.

Having consider all matters, I award a sum of RM100,000 as general damages for the libel. I also award a further sum of RM100,000 as aggravated damages with interest on both these sums at 6% per annum from date of filing of this suit, namely 21 March 1996. I also award costs to be taxed.

B

Plaintiff's claim allowed.

Reported by Loo Lai Mee

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